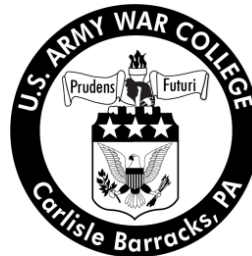


A Compelling Solution to Guantanamo Bay

by

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United States Army War College
Class of 2013

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Abstract

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Congress must create a new federal court located at Guantanamo Bay to improve the U.S. image and give the detainees due process. The current system is flawed and must be replaced. There are 166 detainees still at Guantanamo Bay, and how the U.S. treats them has strategic implications for our foreign policy objectives. The current military system is negatively affecting at least three instruments of national power (diplomatic, informational, and law enforcement). Congress and the President are at an impasse. Federal courts have already reversed or vacated most of the convictions under the military commission system. Military prosecutors, judges, the American Bar Association, international rights groups and the international community have condemned the current process. Congress can specifically design this new federal court to deal with the unique situation presented by the detainees. This paper will examine the issues involved with the detainees and demonstrate why Congress should create a new federal court in order to remove the international stigma created by the current system and show the world that the U.S. will provide fundamental due process to even those who commit terrorists' acts against America.

A Compelling Solution to Guantanamo Bay

A future American President will have to apologize for Guantanamo.¹

—Justice Richard Goldstone

Background

On his second day in office, January 22, 2009, President Obama issued an Executive Order closing the Guantanamo Bay detention center as soon as possible but no later than January 22, 2010.² Four years later, the detention center is still open with no closing date in sight. Because of federal court decisions, disputes within the branches of government, and the perception of distrust in the international community, the current military system is fundamentally flawed and must be replaced. There are 166 detainees still being held at Guantanamo Bay, and how the United States treats them has strategic implications for our foreign policy objectives. The world is watching to see if the United States will provide the remaining detainees with due process.³ Congress and the President are at an impasse but there is an available compromise. Congress must act now to resolve the issue by dissolving the current system and replacing it with a new Article III federal court located at Guantanamo Bay. This new federal court can be specifically designed to deal with the unique situation presented by the detainees. This paper will examine the issues involved with the detainees and demonstrate why Congress should create a new federal court in order to remove the international stigma created by the current military system and show the world that the United States will provide fundamental due process to even those who commit terrorists' acts against America.

The real problem with Guantanamo Bay is that many people, not just in the international community, do not believe the current military commission process

provides the detainees fundamental due process. President Obama has tried to close the Detention Center and have the detainees brought to the United States for trial. However, on May 20, 2009, just a few months after the President signed the Executive Order closing the Guantanamo Bay Detention Center, the Senate voted 90-6 against appropriating the \$80 million needed to close the Detention Center so the detainees could not be brought into America.⁴

Senate Minority Leader Mitch McConnell (R-KY) remarked, “Americans don’t want some of the most dangerous men alive coming here.”⁵ On January 7, 2011, the President signed the 2011 Defense Authorization Bill that contains provisions preventing the transfer of Guantanamo prisoners to the United States mainland or to other foreign countries, which once again demonstrates Congress wants the detainees to remain at Guantanamo Bay.⁶ On August 29, 2012, the outgoing Commander in Afghanistan, General John R. Allen, said, “[a]lthough the administration maintains its stance that it wants to close Guantanamo, it will almost certainly stay open for the foreseeable future.”⁷ On November 25, 2012, a *New York Times* editorial stated, “no detainee identified for release by the task force has been certified for transfer overseas or to the United States in nearly two years. At that rate, the chance of emptying Guantanamo before the end of even a second term is zero.”⁸ It is important to look back at why the decision was made to choose Guantanamo Bay as the location to hold the detainees, because those same considerations are still relevant in deciding whether or not to establish a new Article III federal court at Guantanamo.

Why Guantanamo Bay

In response to the terrorist attacks of September 11, 2001, Congress enacted the Authorization to Use Military Force (AUMF), which granted the President the authority

“to use all necessary and appropriate force against” those who “planned, authorized, committed, or aided the terrorist attacks.”⁹ The Bush administration believed there were policy and legal advantages to holding the detainees outside the borders of the United States.¹⁰ The facility at Guantanamo Bay offered an ideal location because the United States already had a base located there.¹¹

The Detention Center at Guantanamo Bay is isolated and easily defended. The legal advantages to housing the detainees at Guantanamo Bay also played into the decision to put them there. Initially, the Bush administration thought that noncitizen detainees at Guantanamo may be outside the jurisdiction of the United States federal court system and therefore could not challenge their detention using federal *habeas corpus* challenges.¹² The administration also determined that aliens held outside the territorial borders of the United States may not have constitutional rights under the due process clause of the Fifth Amendment.¹³ Therefore, recognizing there were policy and legal advantages to holding them outside of the United States, the Bush administration decided to hold persons captured in the “War on Terror” at Guantanamo Bay.

The Detention Facility is Not the Problem

In 2002, the Bush Administration designated Guantanamo Bay as the location to hold detainees from the “War on Terrorism.” On January 11, 2002, the first 20 detainees were brought to the facility and housed in open air cages at Camp X-Ray located inside of Guantanamo Bay Naval Base.¹⁴ To accommodate the detainees, numerous improvements have been made to the detention center. Currently, there are 166 detainees at the detention center segregated among five camps.¹⁵ The facilities at the Detention Center are no longer the point of contention because the United States has built a new \$31 million dollar state of the art prison there with the same modern

accommodations as federal prisons in the United States.¹⁶ Likewise, how the detainees are currently physically treated by the prison guards is no longer an issue.¹⁷ Members of Congress have frequently visited the Detention Center and have “praised the humaneness of the captives’ treatment and the professionalism of the troops.”¹⁸ To understand the legal issues, it is useful to have an understanding of the detainee population and how they are categorized.

Detainee Population

The detention center at GTMO currently holds alleged terrorist trainers, terrorist financiers, bomb makers, Osama Bin Laden bodyguards, and recruiters and facilitators.¹⁹ Seven hundred and seventy-nine detainees have passed through the facility since it opened in 2002.²⁰ There have been detainees from over 30 different countries.²¹

A report for Congress divided the detainee population into three basic categories:²²

1. Detainees who have been placed in “preventative detention” to stop them from returning to the battlefield. They are individuals labeled as “enemy combatants”²³ who are not being held at Guantanamo for punishment, but are merely being held until the cessation of hostilities to keep them from being released and taking up arms once again against America and our allies.
2. Persons who may be brought before a military or other tribunal to face criminal charges for alleged violations of the law of war in addition to being held in “preventative detention.”
3. Persons who have been cleared for transfer or release to a foreign country, either because: (a) they are not believed to have engaged in hostilities, or (b) they are no longer considered a threat to U.S. security.²⁴

Sixty percent of the detainees were taken into custody in Afghanistan; thirty percent were captured in Pakistan; and ten percent came from other countries.²⁵

Approximately forty percent of the detainees were citizens from Yemen and over ten percent were from Afghanistan.²⁶ Eighty percent of the detainees at Guantanamo Bay in 2010 had been there since 2002. Most of them were captured during the early months of operations in Afghanistan.²⁷ The detainee population at Guantanamo Bay has decreased by 76 prisoners since President Obama took office.²⁸ The current population of 166 detainees has not increased under the Obama Administration because the United States is not bringing any new detainees to the Guantanamo Bay Detention Center.²⁹ Examining the significant legal developments concerning the detainees is essential in order to reach a solution on how to process the remaining 166 detainees.

Significant Legal Developments

Hamdi v. Rumsfeld (2004) (Category 1 above “Preventative Detention”)

The United States Supreme Court has not been able to render a majority decision that clearly delineates the legal status and rights of the detainees. The first major decision dealing with the detainees is *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Yaser Esam Hamdi was born in Louisiana in 1980 but moved with his family to Saudi Arabia when he was a child.³⁰ At the age of 20, he was captured in Afghanistan and turned over to U.S. military authorities.³¹ In January of 2002, he was taken to the Guantanamo Bay Detention Center but transferred to the Navy prison at Norfolk, Virginia when it was discovered he held dual United States and Saudi citizenship.³² Hamdi’s father filed a *habeas corpus* petition in the United States Court for the Eastern District of Virginia challenging his indefinite detention and the determination that he was an “enemy combatant.”³³ On appeal, the case made it to the United States Supreme Court.

Although the Supreme Court was unable to render a majority opinion, eight justices agreed that the Executive Branch has the authority to detain individuals, even United States citizens, “for the duration of the particular conflict in which they were captured,” in order to prevent them from returning to the battlefield.³⁴ However, writing for a plurality of the court, Justice O’Connor (joined by Chief Justice Rehnquist, Justice Breyer, and Justice Kennedy) held that a citizen-detainee has the right to challenge their detention status before an impartial authority.³⁵

In the plurality opinion, Justice O’Connor stated that due process in any given circumstance is “determined by weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest.”³⁶ The plurality opinion recognizes that Hamdi’s right to be free from physical detention is the most elemental of liberty interests and that freedom “from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.”³⁷ The plurality opinion found merit to the arguments that humanitarian relief workers and journalists were at significant risk of being detained by mistake in the absence of a sufficient process.³⁸ Justice O’Connor suggested that the Department of Defense create fact-finding tribunals similar to the tribunals set forth in Army Regulation AR 190-8, which is a multi-service regulation implementing Department of Defense guidance on the procedures for Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees.³⁹

The plurality opinion stated that because of the ongoing military conflict and the inherent authority of the President in armed conflict, detainee proceedings may deviate from normal federal rules:

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be

tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.⁴⁰

Justice Scalia and Justice Stevens dissented, arguing that the government only had two ways in which to continue detaining Hamdi: either try Hamdi under normal criminal laws or Congress must suspend the right to *habeas corpus*.⁴¹ Justice Scalia, known as a conservative jurist and one who is opposed to judicial activism, argued that no matter how well-intentioned the plurality opinion, the Supreme Court had no basis for trying to invent new procedures that might be acceptable governing Hamdi's detention.⁴² In Scalia's dissent, he advocated that the Court should either uphold Hamdi's detention or declare it unconstitutional.⁴³

OARDEC (2004)

In response to the *Hamdi* decision, the Department of Defense followed Justice O'Connor's suggestion and created the Office of the Administrative Review of the Detention of Enemy Combatants (OARDEC), which closely resembles the tribunal in AR 190-8, section 1-6. OARDEC conducted both the Combatant Status Review Tribunals (CSRT) and the Annual Review Boards (ARB) for detained enemy combatants at Guantanamo.⁴⁴ The CSRTs are used to determine whether a detainee meets the criteria to be labeled as an "enemy combatant," and the ARBs are conducted annually to determine if detainees still pose a threat to the United States.⁴⁵ Military members from the Navy, Air Force, Marines and Army staff OARDEC.⁴⁶ Three military field grade officers convene to examine evidence and make recommendations to the Deputy Secretary of Defense, who then makes the final status determination.⁴⁷ The CSRT

boards require one member to be a JAG officer, and an ARB requires one officer to have a specialty in intelligence.⁴⁸

Neither board is technically a legal proceeding because they are conducted by a military commission established under the executive branch.⁴⁹ Historically, military commissions are not considered as a “court” or a “tribunal” but rather “an advisory board of officers” convened for the purpose of informing the commanding officer.⁵⁰ Yale Law School International law professor Harold Hongju Koh argues that the military commissioners are not independent because they are ultimately answerable to the Secretary of Defense and the President, who prosecute the case.⁵¹ Professor Koh even points out that when sitting American judges have served on military commissions, their independence has been compromised because as appointees of the executive branch they are capable of being fired or ordered to rule under executive influence.⁵² There were 558 detainees when OARDEC was implemented and by December 16, 2008, 330 detainees had been transferred or released.⁵³

Hamdan v. Rumsfeld (2006) (Category 2 above Prosecution for Criminal Charges)

The next major Supreme Court decision regarding the detainees was *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Salim Ahmed Hamdan was captured during the invasion of Afghanistan in the fall of 2001 and sent to the Guantanamo Bay Detention Center in 2002.⁵⁴ In 2004, the United States alleged he was a bodyguard and chauffeur for Osama Bin Laden and charged him with the crime of conspiracy to commit terrorism.⁵⁵ The Bush administration elected to prosecute Hamdan using a military commission.⁵⁶

Hamdan was assigned a military defense lawyer, Navy Lieutenant Commander Charles D. Swift, who filed a petition for *habeas corpus* in federal court

alleging that the military commission was unconstitutional because it lacked the authority to prosecute him and that the procedures violated the “most basic tenets of military and international law.”⁵⁷ The case was ultimately appealed to the United States Supreme Court which held that the military commissions were unconstitutional under both the UCMJ, as well as the Geneva Conventions.⁵⁸ However, once again, the court could only reach a majority decision on certain aspects of the case.⁵⁹

The majority opinion written by Justice Stevens held that the CSRT military commission deviated from the UCMJ in three main aspects: (1) the defendant and his attorney could be forbidden to view certain evidence and Hamdan’s attorney could even be forbidden to discuss certain evidence with his client; (2) evidence could be admitted that was hearsay, unsworn live testimony, or statements obtained through coercion; and (3) that appeals would not be heard by courts but instead would be decided within the executive branch.⁶⁰ The majority opinion also concluded that the lower federal appellate court had erroneously ruled that Common Article 3 of the Geneva Conventions did not apply.⁶¹ The majority concluded that once Common Article 3 applied, the military commission violated Common Article 3 because the military commission was not a “regularly constituted court” as required by Common Article 3.⁶² The Supreme Court ruled that the military commission cannot be used to try Hamden of a crime because the commission failed to meet the requirements of the UCMJ or of the Geneva Conventions and violated the laws of war.⁶³ In a section of the plurality opinion, Justice Stevens questioned whether military commissions had the jurisdiction and authority to try “conspiracy” charges because that offense is not a clearly defined war crime or clearly defined by statute.⁶⁴

Justice Kennedy did not join Justice Stevens' plurality opinion regarding whether or not military commissions had the authority to try criminal conspiracy charges. However, Justice Kennedy wrote a concurring opinion in which he questioned whether the military commission violated separation of powers because one branch of the government, namely the Executive, controlled all aspects of the case including the appellate review of the case.⁶⁵ In light of these issues, Justice Kennedy agreed that the military commissions were "unauthorized," but he opined that Congress had the authority to re-write the law in order to address these concerns.⁶⁶

Justice Scalia wrote a dissent joined by Justices Thomas and Alito in which he argued the Supreme Court lacked jurisdiction to even hear the case.⁶⁷ Justice Scalia based his argument on the language in the Detainee Treatment Act (DTA) passed by Congress that went into effect on December 30, 2005.⁶⁸ The specific language states no "court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."⁶⁹

Justice Thomas also dissented, agreeing that the federal courts had no jurisdiction for the reasons in Justice Scalia's dissent.⁷⁰ He also went even further by asserting that Common Article 3 of the Geneva Conventions does not apply to Hamdan because Common Article 3 applies to armed conflicts "not of an international character," but the fight against Al Qaeda is "international in scope."⁷¹ In Justice Thomas' opinion, the President's decision to use a military commission "is entitled to a heavy measure of deference."⁷² He also disagreed with the plurality holding that the military commissions do not have jurisdiction to hear criminal conspiracy charges, stating their jurisdiction is

not prescribed by statute but rather “adapted in each instance to the need that called it forth.”⁷³

Justice Alito dissented and agreed with Justices Scalia and Thomas that the court lacked jurisdiction to hear the case.⁷⁴ He also disagreed with the holding that found the military commissions failed to meet the definition of a “regularly constituted court” as required by Common Article 3 of the Geneva Conventions.⁷⁵ Justice Alito stated that even if Geneva Convention Article 66 prohibits “special” tribunals, the current military commission established for Hamdan met the common definition of “regular” and was not “special.”⁷⁶ Justice Alito disagreed with Justice Kennedy’s reasoning that “an acceptable degree of independence from the Executive is necessary to render a commission ‘regularly constituted’ by the standards of our Nation’s system of justice.”⁷⁷

Military Commissions Act of 2006

Salim Ahmed Hamdan’s lawyers had won the first major legal battle by having the military tribunal system held unconstitutional. However the legal war was far from over for Salim Ahmed Hamdan. In response to the Supreme Court decision in *Hamdan*, Congress enacted the Military Commissions Act of 2006 (MCA of 2006).⁷⁸ Section 948 of the MCA of 2006 gives the President the authority to establish military commissions to try “alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.”⁷⁹

On May 10, 2007, the United States charged Salim Ahmed Hamdan with the crimes of conspiracy and providing material support to terrorism pursuant to the MCA.⁸⁰ His lawyers immediately sought to have the charges dismissed on the grounds that he was a “minor figure,” and that the Law of War does not authorize conspiracy charges to be brought against minor figures.⁸¹ They also argued that providing material support to

terrorism was not even a crime until the MCA in 2006, so charging him with that crime was an unconstitutional *ex post facto* application of the law.⁸²

A jury of six military officers acquitted Hamdan on the conspiracy charge but convicted him on the charge of providing material support to terrorism.⁸³ On August 7, 2008, Hamdan was sentenced to serve 66 months in prison but given credit for the 61 months he had already served.⁸⁴ A spokesman for the Pentagon first said that Hamdan's status would "revert to 'enemy combatant' when his sentence" was completed in order to allow the United States to hold him indefinitely after he had served the additional five months of his sentence.⁸⁵ Ultimately, the United States decided to transfer Hamdan back to Yemen in January of 2009, where he was released to rejoin his family.⁸⁶

While Hamdan had successfully used the writ of *habeas corpus* to have his case reviewed in federal court, the MCA of 2006 enacted pursuant to *Hamdan* had removed the right of detainees to file for *habeas corpus* relief.⁸⁷ *Habeas corpus* relief allows detainees to get access to the United States federal courts in order to challenge their detention status.⁸⁸ Whether Congress could constitutionally remove the right to file for *habeas corpus* relief would be the next major legal battle. The lawyers representing a detainee named Lakhdar Boumediene would take up that battle and strike yet another blow to the military commission system.

Boumediene v. Bush (2008)

In 2002, Lakhdar Boumediene was seized by Bosnian police after United States intelligence officers suspected his involvement in a plot to attack the United States Embassy in Bosnia.⁸⁹ Boumediene was taken to the Detention Center at Guantanamo Bay, and a CSRT designated him as an "enemy combatant."⁹⁰ Boumediene filed a writ

of *habeas corpus* in the United States District Court for the District of Columbia that was dismissed, but on appeal eventually made it to the Supreme Court.⁹¹ In *Boumediene v. Bush*, 553 U.S. 723 (2008), the United States Supreme Court ruled that Boumediene had the right to file a *habeas corpus* petition under the United States Constitution and that the attempt by Congress to suspend that right was unconstitutional.⁹² It is worth noting that the American Bar Association filed an *amicus curiae* brief on behalf of Boumediene arguing that his “indefinite detention without a fair hearing” (emphasis added) violated the due process clause of the Fifth Amendment to the Constitution.⁹³

Military Commissions Act of 2009

In response to the Supreme Court decision in *Boumediene*, Congress again tried to fix the legal problems by enacting the Military Commissions Act of 2009 (MCA of 2009).⁹⁴ The key provisions gave the detainees greater due process rights by limiting hearsay or coerced confessions and gave the defense more access to witnesses and evidence.⁹⁵ However, the American Civil Liberties Union (ACLU) and the Human Rights Watch (HRW) both claimed even with the new modifications, the system is still fatally flawed and unconstitutional.⁹⁶ Congress undoubtedly hoped the revisions in the MCA of 2009 had bolstered the shaky foundation of the military commission system. However, an old case would resurface and further erode confidence in the military commission system.

Hamdan v. Rumsfeld (2012)

Even though he was released as previously discussed, Salim Ahmed Hamdan’s attorneys had appealed his conviction. On October 16, 2012, the United States Court of Appeals for the District of Columbia Circuit overturned his entire conviction and he was acquitted of all charges.⁹⁷ The Court based its decision to overturn his conviction on the

grounds that providing material support for terrorism was not a crime until Congress made it one in the MCA of 2006.⁹⁸ Therefore, it was an unconstitutional application of an *ex post facto* law to charge Hamdan with crimes that were not illegal at the time he committed the acts.⁹⁹ This ruling has serious implications for other detainees because if providing material support for terrorism was not a crime until the MCA of 2006, then none of them can be charged with that crime because all the acts they are accused of committing occurred before the year 2006. On January 25, 2013, the United States Court of Appeals for the District of Columbia reversed another conviction under the military commission system.¹⁰⁰

Al-Bahlul v. United States (2013)

Ali Hamza al-Bahlul of Yemen was captured in December 2001 and taken to the Detention Center at Guantanamo Bay in 2002.¹⁰¹ The United States accused al-Bahlul of conspiracy, solicitation of murder, and providing material support to terrorism.¹⁰² He is widely known as Osama Bin Laden's "press secretary" because he produced propaganda videos for Al Qaeda before his capture.¹⁰³ In November 2008, al-Bahlul was sentenced to life in prison after nine military officers deliberated less than an hour and found him guilty of 35 counts of conspiracy, solicitation to commit murder and providing material support for terrorism.¹⁰⁴ Al-Bahlul appealed his conviction to the United States Court of Appeals for the District of Columbia Circuit.¹⁰⁵

On January 9, 2013, the United States filed a brief in al-Bahlul's appeal stating that in light of the *Hamdan* decision, discussed above, the court is required to reverse al-Bahlul's convictions.¹⁰⁶ Prosecutors conceded that conspiracy, solicitation to commit murder and providing material support for terrorism were not internationally recognized as war crimes at the times al-Bahlul committed the acts.¹⁰⁷ On January 25, 2013, the

United States Court of Appeals for the District of Columbia vacated all of al-Bahlul's convictions by the military commission.¹⁰⁸ James Connell, a defense lawyer for one of the 9/11 suspects said, "the ruling highlighted the lack of neutrality in the Guantanamo court system, where the same Pentagon appointee, known as the convening authority, decides what charges will go to trial, what the maximum penalty will be and who will make up the jury pool."¹⁰⁹ The military commission system appears to be an unconstitutional violation of the separation of powers requirement.

The conclusion that can be drawn from these legal decisions is that the military system is fundamentally flawed. After being established following the September 11, 2001 attacks, the military system has completed only seven cases and five of those have been reversed or vacated by federal courts.¹¹⁰ Moreover, as evident by the decisions discussed above, even the United States Supreme Court has a difficult time in reaching a majority decision about the military commission system. The military commission system also has a stigma that cannot be overcome no matter how Congress tries to improve it.

The Current Process is Fundamentally Flawed

The current military commission system is doomed from a public relations standpoint and on very shaky grounds from a legal perspective. The international community has harshly criticized the United States handling of the detainees and there is a growing sentiment in the United States to abandon the military commission process. Over 700 American law professors signed a letter submitted to the chair of the Senate Committee on the Judiciary stating the military system undermines the Rule of Law and violates the separation of powers.¹¹¹ The current system has even strained the United States' relationship with close allies, including Britain and Saudi Arabia.¹¹²

The current military system is decreasing the United States effectiveness in employing at least three instruments of national power. The United States' instruments of national power are often described using the DIMEFIL model. DIMEFIL is an acronym for diplomatic, informational, military, economic, financial, intelligence, and law enforcement. The current military system is straining our relationships with other countries and thus hurting the diplomatic element of our national power. As discussed below, the current military system is a public relations disaster, which diminishes our informational element of national power. The United States' ability to influence and persuade other countries to improve human rights conditions, conduct fair trials, and follow the rule of law is also diminished as long as the present system continues to operate. Thus, our diplomatic, law enforcement and legal instruments of national power are also diminishing. A few examples illustrate why the United States is losing prestige in the international community by continuing to use the military commission system.

Public Relations Failure

On May 19, 2002, a UN panel said that holding detainees indefinitely at Guantanamo violated the world's ban on torture.¹¹³ Amnesty International has called the situation at Guantanamo "a human rights" scandal.¹¹⁴ On August 16, 2011, CNN.com published an article captioned "Ten Years On, Kuwaiti Inmates Fear Indefinite Guantanamo Detention."¹¹⁵ The CNN article highlights some of the continuing problems with the military commission process.

The CNN article focuses on the saga of Fayiz Mohammed Ahmed Al Kandari, who claims he left Kuwait in the summer of 2001 to do charitable work, just as he had done in 1997 (Afghanistan) and in 1994 (Bosnia). His passport indicates he left in June 2001 when he traveled to Pakistan and then to Afghanistan. The article claims in

October 2001 he was captured and “sold” to U.S. forces in Afghanistan after he was found carrying an AK-47, which he claims was for self-defense. Al Kandari has now been at Guantanamo for over ten years without a trial and is only allowed to phone his family every “several months” according to the article.¹¹⁶ Lt. Col. Barry Wingard is defending Al Kandari and reported that Al Kandari is likely to be indefinitely detained and be one of the unfortunate souls who are presumed guilty, never get a trial, and will die at Guantanamo Bay without ever stepping into a courtroom.¹¹⁷ Other detainee defense attorneys have raised similar complaints. David Cynamon, the lead attorney representing the Kuwaiti detainees at Guantanamo Bay, said that the military court is a “black hole” for the detainees.¹¹⁸

In December 2009, another detainee, Fouad Mahmoud Al Rabiah, was repatriated to Kuwait where he was supposed to live in a rehabilitation center. However, after a few days of interrogation, the Kuwaiti authorities decided there “was no case against Al Rabiah and they allowed him to go free.”¹¹⁹ Kuwait is a key ally in the Persian Gulf, and the majority of Kuwaiti Members of Parliament and thousands of others have signed a petition asking the United States to give the Kuwaiti detainees a fair trial or release them.¹²⁰ Rola Al-Dashti, a member of the Kuwaiti Parliament, said, “[i]t doesn’t look good to look into the U.S. and see this kind of practice.”¹²¹

The United States wants other nations to follow the rule of law and provide basic fundamental rights to those accused of crimes.¹²² However, critics of the current process claim the United States is denying the detainees fundamental due process, but then criticizing other nations for similar violations.¹²³ “Governments must stop

undermining rights they have promised to defend. . . . ‘This policy promotes a world in which arbitrary and unchallengeable detentions become acceptable.’”¹²⁴

Once a suspect is in custody, fair systems of justice should be able to judicially deal with the person based upon the evidence against them. If the United States is “detaining” individuals indefinitely on evidence that will not hold up in any court of law, in excess of ten years, our nation is in no position to preach about human rights violations to other countries. Many point to Guantanamo Bay as one of the contributing factors for diminished U.S. power and prestige.¹²⁵ Critics claim, “[e]very day Guantanamo stays open, the United States is being led further away from the founding principles of our great nation—liberty, freedom and justice for all.”¹²⁶ The United States Department of State has regularly sought to have U.S. citizens’ cases tried in civilian courts instead of military tribunals in Burma, Colombia, Egypt, Peru, and Turkey.¹²⁷ Professor Koh at Yale Law School said, “[t]he use of military commissions potentially endangers Americans overseas by undermining the U.S. government’s ability to protest effectively when other countries use such tribunals.”¹²⁸

On January 27, 2013, Ben Fox from the Associated Press said the recent federal court reversals of the military commission convictions “hang like a cloud over the proceedings.”¹²⁹ James Connell, a defense lawyer representing a Pakistani charged in the September 11, 2001, attacks said, “[t]he fact that no conviction can stand up on appeal does not bode well for the military commission system.”¹³⁰

Legal Failure

The fact that the United States Supreme Court has difficulty in reaching majority decisions regarding the military commissions system is compounded by the fact that an unprecedented number of Guantanamo Bay military prosecutors and commission

members have resigned and openly criticized the military commission system as being fundamentally flawed. Since its inception, at least seven military prosecutors have resigned because they could not ethically or legally prosecute detainees using the current system.¹³¹ One of the first military officers to come forward publicly and criticize the military system was Colonel Morris Davis.

Colonel Morris Davis is a retired active duty United States Air Force attorney.¹³² In September 2005, he was appointed as the third Chief Prosecutor for the military commissions.¹³³ In October 2007, Colonel Davis resigned as Chief Prosecutor for the Commissions at Guantanamo Bay alleging that Pentagon officials were usurping his authority.¹³⁴ Another stated reason for his resignation was that he saw a serious conflict of interest by having almost all elements of the military commission process being put under the command of the Defense Department.¹³⁵ Davis said, "I felt I was being pressured to do something less than full, fair and open."¹³⁶ Colonel Davis resigned as the Chief Prosecutor at Guantanamo Bay to become the Director of the Air Force Judiciary.¹³⁷ Colonel Davis says that when he left Guantanamo Bay, he was denied a medal for his two years as the Chief Prosecutor because he had openly criticized the military commission process.¹³⁸ Colonel Davis said, "I tell the truth, and I get labeled as having served dishonorably. I'm very concerned about the chilling effect...on the process."¹³⁹

After serving 25 years in the Air Force, mostly as a military judge, Colonel Davis retired from the military but he is still outspoken about Guantanamo Bay.¹⁴⁰ Colonel Davis said the legal process the United States is using at Guantanamo Bay puts American Soldiers and citizens at risk if they are detained by foreign forces.¹⁴¹ Colonel

Davis said, “[t]he United States led the effort, particularly in the wake of World War II, in creating the Geneva Conventions and creating this body of law to regulate conflict. And since 9/11, we’ve really turned our back on it.”¹⁴² Another prominent officer that has come out publicly against the military commissions is Lieutenant Colonel Stephen Abraham.¹⁴³

In 2009, Lieutenant Colonel Stephen Abraham, who served on the CSRT, released a sworn affidavit to the United States Supreme Court in which he said the process was “fundamentally flawed.”¹⁴⁴ Lieutenant Colonel Abraham is a 26-year veteran of military intelligence and a California lawyer.¹⁴⁵ Abraham said the results were influenced by pressure from superiors rather than based on concrete evidence.¹⁴⁶ Most troubling is the fact that Abraham said that exculpatory information about the detainees was unavailable and possibly even withheld.¹⁴⁷ According to Abraham, intelligence agencies arbitrarily refused to furnish specific information that could have helped either side.¹⁴⁸

The detainees, their supporters and some in the international community view the OARDEC members as being military officers who rubber stamp the detention decisions made by other members of the same Army that captured them.¹⁴⁹ In civilian terms, it would be like having police officers arrest someone for committing a crime and then other police officers on the same police force make a recommendation whether the person should be kept in jail without bail and without trial. Lieutenant Colonel Abraham was not a military prosecutor for the military system (he only served on the CRST), but other military prosecutors in addition to Colonel Morris have also publicly come forward saying the military system is fundamentally flawed.

Lieutenant Colonel Darrel Vandeveld was a military prosecutor for the military commission system from May 2007 to September 2008.¹⁵⁰ He was the seventh military prosecutor at Guantanamo to resign because he could “not ethically or legally” prosecute defendants within the framework of the military commission system at Guantanamo.¹⁵¹ On July 8, 2009, LTC Vandeveld testified in Congress:

I am here today to offer a single, straightforward message: the military commission system is broken beyond repair. Even good faith efforts at revision, such as the legislation recently passed by the Senate Armed Forces Committee, leave in place provisions that are illegal and unconstitutional, undermine defendants’ basic fair trial rights, create unacceptable risks of wrongful prosecution, place our men and women in uniform at risk of unfair prosecution by other nations abroad, harm the reputation of the United States, invite time consuming litigation before federal courts, and, most importantly, undermine the fundamental values of justice and liberty upon which this great country was founded.¹⁵²

Even the Navy Judge Advocate General who was at the Pentagon on September 11, 2001, has openly criticized the military commission system.¹⁵³ Retired Navy Rear Admiral Donald J. Guter in a letter to the editor of the *New York Times* on November 29, 2012, said, “[t]he military commission system at Guantanamo is a make-it-up-as-you-go system, unlike the proven federal court system.”¹⁵⁴ Retired Rear Admiral Guter is currently President and Dean of the South Texas College of Law. It is one thing for outside organizations like the American Civil Liberties Union and the Human Rights Watch to criticize the military commission system, but how many prominent military attorneys must come forward before the United States abandons the military commission system? Now, there is even an internal dispute within the Obama Administration on how to proceed against the remaining detainees.

Brigadier General Mark S. Martins is the chief prosecutor of the military commissions system who was brought in by the Obama Administration to try to bring

credibility to the military commissions system.¹⁵⁵ Brigadier General Martins is a Rhodes Scholar who graduated first in his class at West Point and who served five years in Iraq.¹⁵⁶ The increasingly public dispute within the Obama Administration centers around whether or not to proceed with conspiracy charges in light of the *Hamdan* decision discussed above, which held that conspiracy to commit terrorism was not a crime until the MCA of 2006. In light of *Hamdan*, Brigadier General Martins decided to abandon the conspiracy charges for the remaining detainees, but the Pentagon official who oversees the commission system, Bruce MacDonald, refused to withdraw the conspiracy charges, citing the Department of Justice's position that conspiracy remains a valid offense.¹⁵⁷

Brigadier General Martins refused to sign the Justice Department's brief in the *al-Bahlul* case discussed above, and he indicated his office would focus on "legally sustainable" ones like the classic war crime of attacking civilians.¹⁵⁸ This dispute within the Obama Administration casts another large shadow over the military commission system. Retired military judge Gary Solis, an Adjunct Professor at the United States Military Academy and who teaches wartime law at George Washington and Georgetown Universities, said, "[i]t really is amazing. They brought Martins in to square it [the military commission system] away, and everyone on all sides said 'if anyone can do it, it's Martins.' Then when Martins offers his best advice, it's rejected."¹⁵⁹ Yale Law Professor Eugene Fidell thinks disagreements like this latest one highlight a fundamental flaw in the military commission system saying, "[t]he fact that one chief prosecutor after another has had to cross swords with the appointing/convening

authority is disturbing and suggests to me that there is something basically unsound in the overall architecture of the system.”¹⁶⁰

The future of the military commission system is like the RMS Titanic in that it has received enough fatal blows to sink it. The President and Congress are at a stalemate, and the present military system is a public relations disaster both at home and abroad. The federal courts have reversed or vacated the convictions that have been obtained in the military commission system, which has only successfully handled seven cases since its inception. Military prosecutors, judges, law professors, and the American Bar Association have openly said the current system is broken and fundamentally flawed, and now there is an internal dispute within the administration on how to proceed. It is time for the United States to abandon the military commission system. If the United States abandons the military commission system, then two questions need to be answered: (1) What location should be selected to conduct the detainee proceedings; and (2) What system should the United States use to replace the military commission system? In answer to the first question, having the proceedings at Guantanamo Bay is the best alternative.

Keeping the Detainees at Guantanamo Bay

Having the detainees kept at Guantanamo Bay reduces the likelihood of their escape either by their own means or from a terrorists’ plot to rescue them because it is so isolated. If they were to escape or be rescued in an attack on the facility, many would undoubtedly resume hostile actions against the United States as soon as they have the ability. Former Vice President Dick Cheney said:

The people that are there are people we picked up on the battlefield primarily in Afghanistan. They’re terrorists. They’re bombmakers.

They're facilitators of terror....For the most part, if you let them out, they'll go back to trying to kill Americans.¹⁶¹

Former Vice President Cheney's comment has been validated by James Clapper, Director of National Intelligence, who reported the recidivism rate of released detainees who had resumed terrorist or insurgent activity had risen to an estimated twenty-seven percent.¹⁶²

As evident by their voting, Congress does not want these individuals inside the borders of the United States. If they were flown into the United States for trial and found not guilty, the detainees could raise a compelling claim for immigration or asylum status since the United States brought them into the United States. If a detainee whom the United States alleged had committed a war crime is acquitted, the international community would be outraged if the United States announced that in spite of the criminal acquittal, the detainee would still be kept in "preventative detention."

Even though the Bush Administration was mistaken in believing that the entirety of the due process clause would not apply to the detainees, there remain strong legal considerations that support keeping the detainees outside of the continental United States. The Supreme Court has held that our Constitutional protections, both procedural and substantive due process, apply to all persons located within the United States physical borders, regardless of their citizenship.¹⁶³ The Supreme Court has repeatedly recognized that at least some constitutional protections are "unavailable to aliens outside our geographic borders."¹⁶⁴ Therefore, it is prudent not to bring the detainees onto American soil, which may trigger giving them additional rights to which they would not otherwise be entitled. Congress and the American public want to keep the detainees outside of the continental United States, and the United States already

has a state of the art facility detention center at Guantanamo Bay with an indefinite lease from Cuba.¹⁶⁵ However, if the United States is going to keep the detainees at Guantanamo Bay, the United States must decide what legal process to use to replace the military commission system.

Article III Federal Court at Guantanamo Bay

Congress can demonstrate to the world our nation adheres to the rule of law, provides fundamental due process to the detainees, and yet keep the detainees out of the American heartland by creating a new Article III federal court at Guantanamo Bay. Federal courts are much more efficient than the military commission system, and Congress has more than one option in creating a new federal court at Guantanamo Bay.

Federal courts are much more efficient at prosecuting terrorism cases than are the military commissions. One major criticism of the military commissions is how long the detainees are held before they can challenge their status or before any formal charges are brought against them. New York University's Center on Law and Security reported that 578 terrorism-related cases "inspired by jihadist ideas" had been prosecuted in the federal courts during the same time that the military commission in Guantanamo completed only seven cases.¹⁶⁶ Not only are federal courts more efficient, the time between arrest and conviction is much shorter in federal court than in the military commission system. The majority of the 578 cases in federal court had a conviction within one year of the time of arrest.¹⁶⁷ By comparison, the shortest time between initial capture and conviction in the military commission system was over five years and the longest of the seven cases took nine years and seven months to

complete from the time of capture.¹⁶⁸ The costs of establishing a new federal court are minimal and thus not an issue.¹⁶⁹

It is acknowledged that creating a new federal court would not solve all of the issues. For example, creating a new federal court would not resolve the *ex post facto* issue that conspiracy was not a valid crime until the MCA of 2006. However, there are no benefits in proceeding with the military commission system knowing that any convictions will still be challenged on a host of other legal grounds. However, creating a new federal court would eliminate most of the legal challenges. For example, creating a new federal court would eliminate the argument that the conviction was obtained in violation of our Constitution's separation of powers. A new federal court would also be a "regularly constituted court" as required by Common Article 3 of the Geneva Conventions. Even though conspiracy to commit terrorism is no longer a valid charge, there remain many valid charges recognized under international law that can be used to convict the detainees in a new federal court, such as (1) attacking civilians, (2) attacking civilian objects, (3) murder in violation of the law of war, (4) destruction of property in violation of the law of war, (5) hijacking or hazarding a vessel or aircraft, (6) terrorism, and (7) causing serious bodily injury.¹⁷⁰ To respond to the various challenges of our current system, Congress has various options in establishing a new federal court at Guantanamo Bay.

Article III Constitutional Courts

Article III of the Constitution establishes only one court: the United States Supreme Court. However, Article III, Section 1 vests in Congress the authority to create such "inferior courts as the Congress may from time to time ordain and establish." Courts created under this Article III authority are Constitutional Courts. The Supreme

Court, Federal Courts of Appeal, and Federal District Courts are the Constitutional Courts. Pursuant to Article III, Section 1 of the Constitution, Article III judges enjoy lifetime appointments (unless impeached) and Congress lacks the authority to decrease their salaries.

Having a member of the Judicial Branch (federal judge) instead of a member of the Executive Branch preside over the proceedings would immediately improve the international perception and help demonstrate that the United States is serious about providing the detainees fair and impartial judicial review. Unlike the three members of the OARDEC tribunal, an Article III federal judge is not a member of the military and the independent nature of our federal courts is documented and renowned from as far back as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which helped define the boundary between the separate branches of government and established the authority of the federal courts to declare laws unconstitutional.¹⁷¹ If Congress were to establish an Article III federal court at Guantanamo with a federal judge who was appointed for life, it would immediately help in removing the cloud of suspicion lingering over the detainee proceedings and vastly improve the United States' image in the international community.

Under the current military system, the three members of the military tribunal still have to answer to superior military officers or Executive Branch senior civilians who write their evaluations and thus influence future promotions. Thus, there is Executive Branch influence and oversight of the decisions because the OARDEC recommendations go to the Deputy Secretary of Defense, who answers to the Secretary of Defense, who answers to the President. In 1957, in *Reid v. Covert*, 354 U.S. 1, 39

(1957), Justice Black said, “[s]uch blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.” Having a federal judge appointed with a lifetime tenure would provide immediate credibility and impartiality to the detainee decisions.

Article I (Legislative) and Article IV (Territorial) Courts

Other than Article III courts, Congress has two other avenues of establishing federal courts that are lesser and not as protected as Article III courts. They are lesser because the judges do not enjoy lifetime appointments.¹⁷² Article I Section 8 of the Constitution authorizes Congress to “constitute Tribunals inferior to the supreme Court.” Article I courts are sometimes referred to as legislative courts. Article IV of the Constitution also authorizes Congress to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” Article IV courts are sometimes referred to as territorial courts.¹⁷³

Using their Article I and Article IV authority, Congress has legislatively created all of our other territorial courts, tax courts, and the Court of Military Appeals.¹⁷⁴ The judges of these courts do not have lifetime tenure and Congress determines how many years of tenure they will serve. The terms for these judges have traditionally been eight to fifteen years but they can serve multiple terms.¹⁷⁵ However, even a single term is long enough to give these judges insulation and independence from political pressures that may arise periodically from the Executive Branch since Presidents are term limited to eight years even if elected for a second term. Therefore, federal judges in Article I and Article IV courts serve at least as long as a two-term President.

Congress has established Legislative Courts in Guam, Puerto Rico, the Northern Mariana Islands, the Virgin Islands, and in the Panama Canal Zone.¹⁷⁶ One of the newest Legislative Courts is the Court of Veterans Appeals established by President Reagan on November 18, 1988.¹⁷⁷ Judges on the Court of Veterans Appeals serve fifteen-year terms of office, and the Court of Veterans Appeals has exclusive jurisdiction to review decisions of the Board of Veterans Appeals.¹⁷⁸

It is clear that Congress has the authority to establish a new federal court located at Guantanamo Bay. An Article III court would be best because the judge would have lifetime tenure and thus be perceived as truly independent by the international community. However, an Article I or Article IV federal court would be a vast improvement over the current military commission system because it would correct the current problem in which all decisions concerning the detainees are made by the Executive Branch, which violates the separation of powers.

In the legislation creating the new court, Congress could legislatively establish many of the procedures. For example, Congress could declare that the federal judge shall preside and rule on all decisions regarding the “preventative detention” status of the detainees by means of a bench trial without the requirement of a jury. Having bench trials before a truly federal independent judge satisfies basic due process requirements. International law does not require that every person receive the right to trial by jury.¹⁷⁹ In fact, even proponents of jury trials admit that many other countries have scaled back or eliminated juries over the past century, and even the United States has enacted recent legal reforms that have reduced the size and frequency of jury trials.¹⁸⁰ However, Congress may determine that if the United States is going to charge a

detainee of committing a war crime, a jury would be required but that the jury venire consist of military and civilian personnel stationed at the Guantanamo Bay Naval Station. The base population of approximately 8,500 is more than sufficient for any jury trials.¹⁸¹

The issue of jury trials is just one example of how Congress could create the new federal court and legislatively establish procedural guidelines designed to fit the unique situation presented by the detainees at Guantanamo Bay. Our Constitution was written to protect American citizens from our own government and to establish a balance of powers between the three branches of government. Our federal courts have demonstrated they are very efficient at prosecuting terrorism-related crimes. Therefore, there are many compelling reasons to create a new federal court at Guantanamo Bay to handle the detainees.

Conclusion

Congress must create a new federal court at Guantanamo Bay to improve the United States' image in the international community and to give the detainees due process. The current military system is negatively affecting at least three instruments of national power (diplomatic, informational, and law enforcement). Congress and the President are at an impasse. Federal courts have already reversed or vacated most of the convictions obtained using the military commission system. Military prosecutors, judges, the American Bar Association, international rights groups and the international community have condemned the current military process.

By creating a federal court that is located at Guantanamo Bay, the United States retains all the benefits of keeping the detainees out of the American heartland and

keeps them from gaining additional Constitution rights by their mere presence inside our borders. Creating a federal court at Guantanamo Bay demonstrates to the world that the United States genuinely provides even terrorists with basic fundamental due process rights. A federal judge with tenure would be insulated and impartial from executive or political influences. Creating a federal court at Guantanamo Bay would not be an automatic panacea for all the problems with the detainees, but it clearly is the best strategic endstate that balances the benefits of keeping the detainees out of the United States and yet demonstrates to the world that the United States will provide even our enemies with impartial judicial review and due process. Creating a federal court at Guantanamo Bay is the best compromise between a President who wants to close the current system and a Congress who wants to keep it open so that detainees remain out of the American heartland. America must lead by example—the time for Congress to act is now.

Endnotes

¹ Alfred de Zayas, “The Many Faces of Guantanamo,” interview by BBC, *LewRockwell.com*, October 5, 2003, <http://www.lewrockwell.com/orig4/zayas1.html> (accessed February 8, 2013). Richard Goldstone is a former South African Supreme Court judge and former Chief Prosecutor for the United Nations International Criminal Tribunal. “Constitutional Court of South Africa: Judges,” <http://www.constitutionalcourt.org.za/site/judges/justicerichardgoldstone/index1.html> (accessed February 8, 2013).

² Barack Obama, Executive Order 13492, “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities,” 74 *Federal Register* 4897, January 22, 2009.

³ The pertinent provision of the Fifth Amendment to the United States Constitution provides no person shall be “deprived of life, liberty, or property, without due process of law.” The Geneva Conventions also contain provisions that may be applicable to the detainees. Legal scholars disagree on exactly what constitutes “due process” for the detainees at Guantanamo Bay, but the following are the protections generally associated with due process in the context of detention: (1) review of detention by the state, (2) the ability of the detainee to appeal the detention decision or to seek judicial review (*habeas corpus*), (3) periodic review of the

detention status to determine if it is still warranted, and (4) release of the detainee when reasons for detention have ceased. See Jelena Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence," *International Review of the Red Cross*, Vol. 87, no. 858, June 2005, http://www.icrc.org/eng/assets/files/other/icrc_002_0892.pdf (accessed February 28, 2013) and "Due Process Protections in the War on Terrorism: A Comparative Analysis of Security-Based Preventative Detention in the United States and the United Kingdom," *Harvard College*, March 2012, http://www.google.com/url?sa=t&rct=j&q=due%20process%20protections%20in%20the%20war%20on%20terrorism%3A%20a%20comparative%20analysis&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2Fwww.gov.harvard.edu%2Ffiles%2FIR%2520thesis%25202.pdf&ei=nI QxUc7xPKiy0AGW-IHgCw&usq=AFQjCNF3m6dLV7GBh9RRoFHDhNTUTi_y0w&bvm=bv.43148975,d.dmQ (accessed February 28, 2013).

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⁵ Peter Finn and Anne E. Kornblut, "Guantanamo Bay: Why Obama hasn't fulfilled his promise to close the facility," *The Washington Post*, April 23, 2011, http://www.washingtonpost.com/world/guantanamo-bay-how-the-white-house-lost-the-fight-to-close-it/2011/04/14/AFtxR5XE_story.html (accessed October 23, 2012).

⁶ Jared Serbu, "Obama signs Defense authorization bill," *Federal News Radio*, January 7, 2011. <http://federalnewsradio.com/?sid=2226350&nid=35> (accessed October 27, 2012).

⁷ Gordon Lubold, "Are We Winning in Afghanistan," September 5, 2012, interview by Gordon Lubold during visit to Kabul, Afghanistan, August 29, 2012. General Allen was Commander of International Security Assistance Force (ISAF) and has been nominated to be NATO's Supreme Allied Commander.

⁸ Editorial. "Close Guantanamo Prison," *The New York Times*, November 25, 2012, http://www.nytimes.com/2012/11/26/opinion/close-guantanamo-prison.html?_r=0 (accessed February 9, 2013).

⁹ *Authorization to Use Military Force (AUMF)*, Public Law 107-40 (September 18, 2001).

¹⁰ Michael J. Garcia *et al.*, *Closing the Guantanamo Detention Center: Legal Issues*, (Washington, DC: U.S. Library of Congress, Congressional Research Service, April 14, 2009), 2.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Ingrid Arnesen, "Detainees not Covered by Geneva Conventions," *CNN Online*, June 9, 2004, <http://www.cnn.com/2004/LAW/06/09/detention.report/> (accessed February 8, 2013).

¹⁴ Anna Naimark, “New National Defense Authorization Act Authorizes Indefinite Detention of U.S. Citizens,” *The Human Rights Brief*, March 27, 2012, <http://hrbrief.org/2012/03/new-national-defense-authorization-act-authorizes-indefinite-detention-of-u-s-citizens/> (accessed October 27, 2012).

¹⁵ COL Donnie L. Thomas (U.S. Army Military Police Joint Detention Group (JDG) Commander at Guantanamo Bay Detention Center from February 8, 2010 to June 10, 2012), interview by author, Carlisle Barracks, PA, January 25, 2013.

¹⁶ Ibid. See also Scott Higham, Joe Stephens and Margot Williams, “Guantanamo—A Holding Cell In War on Terror,” *The Washington Post*, May 2, 2004, <http://www.washingtonpost.com/wp-dyn/content/article/2004/05/02/AR2005040206715.html> (accessed February 23, 2013).

¹⁷ The International Committee of the Red Cross (ICRC) makes routine visits to the Detention Facility. The ICRC reports that the main change over the last ten years was that in the beginning it was the conditions of detention that concerned the ICRC. Today, it is essentially about making sure the detainees have contact with their families. Jean-Paul Corboz, “From the Field—Ten Years of ICRC Action at Guantanamo,” January 18, 2012, *ICRC.org*, 0:46, http://intercrossblog.icrc.org/sites/default/files/audio/JP%20Corboz%20ex-Washington%20D.C_0.mp3 (accessed March 4, 2013).

¹⁸ Higham, Stephens and Williams, “Guantanamo—A Holding Cell In War on Terror.”

¹⁹ “Joint Task Force Guantanamo: Who We Hold and What We Have Learned,” *JTFGTMO.southcom.mil*, January 27, 2011, <http://www.jtfgtmo.southcom.mil/index/Fact%20Sheets/GTMO%20Overview.pdf> (accessed January 29, 2013).

²⁰ Benjamin Wittes *et al.*, “The Current Detainee Population of Guantanamo: An Empirical Study,” *Governance Studies at Brookings*, December 16, 2008.

²¹ Ibid., 7.

²² Garcia *et al.*, *Closing the Guantanamo Detention Center*, 1.

²³ The Bush Administration used the term “enemy combatant” after the September 11, 2001 attacks to describe alleged members of Al Qaeda or the Taliban held in detention as part of the War on Terror. On March 13, 2009, the Obama Administration announced it was abandoning the term “enemy combatant” and instead would only detain those who provide “substantial assistance” to al-Qaeda and the Taliban as opposed to “unwitting or insignificant support.” See “Department of Justice Withdraws ‘Enemy Combatant’ Definition for Guantanamo Detainees,” *United States Department of Justice*, March 13, 2009, <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html> (accessed March 1, 2013); Del Quentin Wilber and Peter Finn, “U.S. Retires ‘Enemy Combatant,’ Keeps Broad Right to Detain,” *The Washington Post*, March 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/13/AR2009031302371.html> (accessed March 1, 2013).

²⁴ Several dozen detainees remain at Guantanamo who have been “cleared for transfer or release” but either no country will accept them or the U.S. believes they would be tortured by a

country that is willing to accept them. Garcia *et al.*, *Closing the Guantanamo Detention Center*, 5.

²⁵ “Final Report: Guantanamo Review Task Force,” *Justice.gov*, January 22, 2010, <http://www.justice.gov/ag/guantanamo-review-final-report.pdf> (accessed January 29, 2013), 15.

²⁶ The top ten countries of origin of the detainees in order are: (1) Yemen, (2) Afghanistan, (3) China, (4) S. Arabia, (5) Algeria, (6) Tunisia, (7) Syria, (8) Libya, (9) Kuwait, and (10) Pakistan. *Ibid.* at 14-15.

²⁷ *Ibid.*, 15.

²⁸ Editorial. “Close Guantanamo Prison,” *The New York Times*, November 25, 2012, http://www.nytimes.com/2012/11/26/opinion/close-guantanamo-prison.html?_r=0 (accessed February 9, 2013).

²⁹ Thomas, Interview.

³⁰ *Hamdi*, 542 U.S. at 510 (O’Connor, J., plurality opinion).

³¹ *Ibid.*

³² *Ibid.*; Jonathon Turley, “Yasser Hamdi, Dual Citizenship, and the Future of National Identity,” *Jonathanturley.org*, August 22, 2007, <http://jonathanturley.org/2007/08/22/yasser-hamdi-dual-citizenship-and-the-future-of-national-identity/> (accessed March 11, 2013).

³³ It is worth noting that in *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004), Justice O’Connor writing for the plurality said, “[t]here is some debate as to the proper scope of this term [“enemy combatant”], and the Government has never provided any court with the full criteria that it uses in classifying individuals as such.”

³⁴ *Hamdi*, 542 U.S. at 518 (O’Connor, J., plurality opinion).

³⁵ *Hamdi*, 542 U.S. at 533 (O’Connor, J., plurality opinion).

³⁶ *Hamdi*, 542 U.S. at 529 (O’Connor, J., plurality opinion).

³⁷ *Hamdi*, 542 U.S. at 529 (O’Connor, J., plurality opinion), quoting from *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

³⁸ *Hamdi*, 542 U.S. at 530 (O’Connor, J., plurality opinion).

³⁹ *Hamdi*, 542 U.S. at 537-38 (O’Connor, J., plurality opinion). Army Regulation 190-8 implements Department of Defense Directive 2310.1.

⁴⁰ *Hamdi*, 542 U.S. at 533-34 (O’Connor, J., plurality opinion).

⁴¹ *Hamdi*, 542 U.S. at 573 (Scalia, J., dissenting).

⁴² *Hamdi*, 542 U.S. at 575-78 (Scalia, J., dissenting).

⁴³ *Hamdi*, 542 U.S. at 576-79 (Scalia, J., dissenting).

⁴⁴ Sarah Stannard, "OARDEC provides recommendations to Deputy Secretary of Defense," *Joint Task Force Guantanamo*, October 29, 2007, <http://www.jtftmo.southcom.mil/storyarchive/2007/October/102907-2-oardec.html> (accessed January 29, 2013).

⁴⁵ *Ibid.*; "Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo Attributable to Senior Defense Officials," *Defense.gov*, March 6, 2007, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3902> (accessed March 11, 2013).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Stannard, "OARDEC provides recommendations to Deputy Secretary of Defense."

⁴⁹ *Ibid.*

⁵⁰ Harold Hongju Koh, "The Case Against Military Commissions," *Yale Law School*, January 1, 2002, (http://www.google.com/url?sa=t&rct=j&q=the%20case%20against%20military%20commissions&source=web&cd=1&cad=rja&ved=0CDIQFjAA&url=http%3A%2F%2Fdigitalcommons.law.yale.edu%2Fcgj%2Fviewcontent.cgi%3Farticle%3D2842%26context%3Dfss_papers&ei=fdEqUfHeFvS40gHuoYCACw&usq=AFQjCNFc7T1Z3fTv_phi-S9GEODyGAQMlg&bvm=bv.42768644,d.dmQ) (accessed February 20, 2013), 339.

⁵¹ *Ibid.*

⁵² *Ibid.*, Footnote 15.

⁵³ *Ibid.*, 1.

⁵⁴ *Hamdan*, 548 U.S. at 566 (Stevens, J., majority opinion).

⁵⁵ *Hamdan*, 548 U.S. at 569-70 (Stevens, J., majority opinion).

⁵⁶ *Hamdan*, 548 U.S. at 569 (Stevens, J., majority opinion).

⁵⁷ *Hamdan*, 548 U.S. at 565-67 (Stevens, J., majority opinion). For the full list of attorneys representing Hamdan, see *Hamdan*, 548 U.S. at 565.

⁵⁸ *Hamdan*, 548 U.S. at 567 (Stevens, J., majority opinion).

⁵⁹ Four Justices also concluded that the crime of conspiracy was not an offense that may be tried by a military commission under the law of war. *Ibid.*

⁶⁰ *Hamdan*, 548 U.S. at 613-15 (Stevens, J., majority opinion).

⁶¹ Article 3 of the Geneva Conventions is often referred to as “Common Article 3” because it appears in all four Geneva Conventions. *Hamdan*, 548 U.S. at 629 (Stevens, J., majority opinion). Common Article 3 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

⁶² *Hamdan*, 548 U.S. at 631-633 (Stevens, J., majority opinion).

⁶³ *Hamdan*, 548 U.S. at 567 (Stevens, J., majority opinion).

⁶⁴ *Hamdan*, 548 U.S. at 598-613 (Stevens, J., plurality opinion).

⁶⁵ *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring opinion). Justice Kennedy says, “[t]rial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review.” *Ibid*.

⁶⁶ *Hamdan*, 548 U.S. at 655 (Kennedy, J., concurring opinion).

⁶⁷ *Hamdan*, 548 U.S. at 655-69 (Scalia, J., dissenting).

⁶⁸ *Hamdan*, 548 U.S. at 655 (Scalia, J., dissenting).

⁶⁹ *Detainee Treatment Act (DTA) § 1005(e)(1)*, 119 Stat. 2742 (December 30, 2005).

⁷⁰ *Hamdan*, 548 U.S. at 678 (Thomas, J., dissenting).

⁷¹ *Hamdan*, 548 U.S. at 718 (Thomas, J., dissenting). Justice Thomas also rejected Hamdan's claims that he was entitled to protections under the Third Geneva Convention on the basis that those protections do not apply to members of Al Qaeda. *Hamdan*, 548 U.S. at 724-25 (Thomas, J., dissenting).

⁷² *Hamdan*, 548 U.S. at 680.

⁷³ *Hamdan*, 548 U.S. at 690.

⁷⁴ *Hamdan*, 548 U.S. at 725 (Alito, J., dissenting).

⁷⁵ *Hamdan*, 548 U.S. at 729 (Alito, J., dissenting).

⁷⁶ *Hamdan*, 548 U.S. at 727-30 (Alito, J., dissenting).

⁷⁷ *Hamdan*, 548 U.S. at 730-31 (Alito, J., dissenting).

⁷⁸ *Military Commissions Act of 2006*, Public Law 109-366 (October 17, 2006).

⁷⁹ *Ibid.*, § 948b.

⁸⁰ "After 5 Years at Gitmo, Alleged Bin Laden Aide Charged," *Associated Press*, May 11, 2007, <http://www.chron.com/news/nation-world/article/After-5-years-at-Gitmo-alleged-bin-Laden-aide-1843117.php> (accessed February 9, 2013).

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Alan Gomez, "Split Hamdan Decision Illustrates Cases' Difficulty," *USA Today*, August 7, 2008, http://usatoday30.usatoday.com/news/world/2008-08-06-gitmo_N.htm (accessed March 11, 2013).

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⁸⁵ *Ibid.*

⁸⁶ "Yemen Releases Former Bin Laden Driver from Jail," *The New York Times*, January 11, 2009, <http://www.nytimes.com/2009/01/12/world/middleeast/12yemen.html?ref=world&r=0> (accessed February 9, 2013).

⁸⁷ *Boumediene v. Bush*, 553 U.S. 723, 738 (2008) (Kennedy, J., majority opinion).

⁸⁸ "FAQs: What is Habeas Corpus," *Center for Constitutional Rights*, <https://ccrjustice.org/learn-more/faqs/faqs%3A-what-habeas-corpus> (accessed March 11, 2013).

⁸⁹ “*Boumediene v. Bush*,” *The Oyez Project at IIT Chicago-Kent College of Law*, February 20, 2013, http://www.oyez.org/cases/2000-2009/2007/2007_06_1195 (accessed February 21, 2013).

⁹⁰ *Boumediene*, 553 U.S. at 732-34 (Kennedy, J., majority opinion).

⁹¹ *Boumediene*, 553 U.S. at 734-35 (Kennedy, J., majority opinion).

⁹² *Boumediene*, 553 U.S. at 732-33 (Kennedy, J., majority opinion).

⁹³ “Preview of United States Supreme Court Cases,” *American Bar Association*, http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_06_1195_Petitionernew.pdf (accessed February 21, 2013), 47.

⁹⁴ Jaclyn Belczyk, “House Passes Amendments to Military Commissions Act,” October 9, 2009, <http://www.webcitation.org/query?url=http%3A%2F%2Fjurist.law.pitt.edu%2Fpaperchase%2F2009%2F10%2Fhouse-passes-amendments-to-military.php&date=2009-12-04> (accessed February 22, 2013).

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Hamdan v. United States*, 696 F.3d 1238 (2012), 2012 U.S. App. LEXIS 21385 (C.A.D.C. 2013), <http://www.lexisnexis.com.ezproxy.usawcpubs.org/hottopics/lnacademic/> (accessed February 22, 2013).

⁹⁸ *Hamdan*, 696 F.3d at 1241.

⁹⁹ *Hamdan*, 696 F.3d at 1250-51.

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¹⁰⁵ *Ibid.*

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as fundamental to our own interests to support a just peace around the world—one in which individuals, and not just nations, are granted the fundamental rights that they deserve.” Ibid., 5.

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¹⁵⁰ Vandeveld, *Hearing on Legal Issues*, 1.

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¹⁵⁵ Charlie Savage, "Who Decides The Laws of War?," *The New York Times*, January 26, 2013, http://www.nytimes.com/2013/01/27/sunday-review/military-tribunals-and-international-war-crimes.html?_r=0 (accessed January 24, 2013).

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¹⁵⁹ *Ibid.* See also, "Gary D. Solis," *USMA.edu*, <http://www.google.com/url?sa=t&rct=j&q=gary%20solis%20united%20states%20military%20academy&source=web&cd=4&cad=rja&ved=0CElQFjAD&url=http%3A%2F%2Fwww.usma.edu%2Fflaw%2Fsiteassets%2Fsitepages%2FGary%2520Solis%2FGary%2520Solis.pdf&ei=Olk1UdXLLLe-70QG3k4HwDA&usq=AFQjCNFCWMyLyc-LyqZRmKK8fxHuaUNt4Jw&bvm=bv.43148975,d.dmQ> (accessed March 5, 2013).

¹⁶⁰ Rozenshtein, "Military Commission Prosecutor's Filings."

¹⁶¹ Dick Cheney, U.S. Vice President, interview by Wolf Blitzer, June 13, 2005, <http://usiraq.procon.org/view.answers.php?questionID=000936&print=true> (accessed November 24, 2012).

¹⁶² Thomas Joscelyn, "Guantanamo Recidivism Rate Climbs Higher," September 14, 2011, http://www.weeklystandard.com/blogs/guantanamo-recidivism-rate-climbs-higher_593545.html (accessed January 29, 2013). According to Clapper, 161 former detainees are now "confirmed" and "suspected" recidivists.

¹⁶³ "But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 2500 (2001)

¹⁶⁴ *Ibid.*

¹⁶⁵ In 1934, the Avery Porko treaty reaffirmed the lease but raised the annual rental payment from \$2,000 a year to \$4,085 in U.S. dollars and made the lease agreement permanent until the U.S. abandons the base. "Destination Guantanamo Bay," December 28, 2001, *BBC News*, <http://news.bbc.co.uk/1/hi/world/americas/1731704.stm> (accessed November 10, 2012). After the Cuban Revolution, Castro's government has cashed only one check, which it claims was cashed in "confusion." The remainder of the un-cashed rental checks are reported

to be kept in Castro's desk drawer according to Anthony Boadle, August 17, 2007, "Castro: Cuba not cashing US Guantanamo rent checks," <http://www.reuters.com/article/latestCrisis/idUSN17200921> (accessed November 10, 2012).

¹⁶⁶ "Facts and Figures: Military Commissions v. Federal Courts," *Human Rights Watch*, <http://www.hrw.org/features/guantanamo-facts-figures> (accessed February 24, 2013).

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ The salary of a federal judge is currently \$174,000. "United States Courts: Federal Judicial Pay Increase Fact Sheet," *USCourts.gov*, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/JudicialPayIncreaseFact.aspx> (accessed January 27, 2013). In fact, one federal judge's salary is less than the salary of three majors to serve on the tribunal, which would exceed \$200,000 in base salary alone. If costs became a concern for Congress, one option to reduce costs would be to have federal Article III judges on "senior status" preside over the Court at Guantanamo on a rotational basis. Federal judges who have obtained senior status have reached the "Rule of 80" and are eligible for retirement as set forth in Title 28 of the U.S. Code, Section 371(c) and essentially perform volunteer service to the court. Senior judges typically handle about 15 percent of the federal courts annual workload. See "United States Courts: Frequently Asked Questions," *USCourts.gov*, <http://www.uscourts.gov/Common/FAQS.aspx> (assessed February 5, 2013).

¹⁷⁰ Rozenshtein, "Military Commission Prosecutor's Filings."

¹⁷¹ "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁷² Robert A. Carp and Ronald Stidham, *The Federal Courts*, 2nd ed. (Washington, DC: Congressional Quarterly, Inc., 1991), 29.

¹⁷³ Jack C. Plano and Milton Greenberg, *The American Political Dictionary*, 9th ed. (Orlando: Harcourt Brace College Publishers, 1993), 269.

¹⁷⁴ Congress has established most territorial courts using Article IV of the Constitution and the judges do not have lifetime appointments. However, Congress can and has established Article III Courts outside the United States. In 1966, Congress enacted federal law 89-571, 80 Stat. 764, which transformed the Puerto Rico federal district court into an Article III Court with lifetime judicial appointments. Even if Congress were to create an Article IV territorial Federal Court at Guantanamo, it would be a vast improvement over the present situation.

¹⁷⁵ For example, the terms of some of the Article I and Article IV judges are: U.S. Magistrate—8 years (28 U.S.C. §631); U.S. Bankruptcy—14 years (28 U.S.C. § 152); U.S. Tax Court—15 years (26 U.S.C. § 7443); U.S. Court of Federal Claims—15 years (28 U.S.C. § 172); U.S. District Court for the Northern Mariana Islands—10 years (48 U.S.C. § 1821); U.S. District Court of Guam—10 years (48 U.S.C. § 1424); and U.S. District Court of the Virgin Islands—10 years (48 U.S.C. § 1614).

¹⁷⁶ Plano and Greenberg, *The American Political Dictionary*, 269.

¹⁷⁷ Carp and Stidham, *The Federal Courts*, 29.

¹⁷⁸ Ibid.

¹⁷⁹ "The Jury and Democracy Project," *PSU.edu*,
<http://www.la1.psu.edu/cas/jurydem/background.html> (accessed January 29, 2013).

¹⁸⁰ The authors' main point is not that bench trials violate due process. Rather, they argue that jury trials serve as a powerful means of civic education and inspiration and deter civic erosion because they link jury service and public engagement. Ibid.

¹⁸¹ "US Naval Station Guantanamo Bay—Naval Technology," *Naval-Technology.com*,
<http://www.naval-technology.com/projects/guantanamo-bay/> (accessed February 24, 2013).